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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: 

Office: Newark

Date:

IN RE: Applicant:



DEC 09 2002

APPLICATION:

Application for Waiver of the Foreign Residence Requirement
under Section 212(e) of the Immigration and Nationality Act, 8
U.S.C. § 1182(e)

IN BEHALF OF APPLICANT:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Newark, New Jersey, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Dominican Republic who is subject to the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant was admitted to the United States as a nonimmigrant exchange visitor on August 15, 1990, with authorization to remain, with extensions, until September 4, 1992. She remained beyond that date. The applicant married a United States citizen on October 20, 1996, and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks the above waiver after alleging that her departure from the United States would impose exceptional hardship on her U.S. citizen spouse and children.

The director determined that the record failed to establish that the applicant's departure from the United States would impose exceptional hardship upon her spouse and denied the application accordingly.

On appeal, counsel states that the Service completely overlooked the evidence presented as to the exceptional hardship that the applicant's spouse and children will suffer. On appeal, counsel lists Service's four reasons for the denial and states that three of the reasons; (1) failure to return to the Dominican Republic after completing the program, (2) the program cost the U.S. taxpayers approximately \$18,000; and (3) her failure to address her illegal employment in the United States, are irrelevant. Counsel refers to the number of affidavits submitted from the applicant, her spouse and other family member in support of her contention that her departure from the United States for a period of two years would cause exceptional hardship to her U.S. citizen spouse and children.

Section 212(e) of the Act states, in pertinent part, that-No person admitted under section 101(a) (15) (J) or acquiring such status after admission-

(i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his residence,

(ii) who at the time of admission or acquisition of status under section 101(a) (15) (J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or...

shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of...the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), may waive the requirement of such two-year foreign residence abroad,...the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest....

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and does not represent exceptional hardship as contemplated by section 212(e) of the Act. Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

In Matter of Bridges, the Board stated that:

In determining the merits of an application for a waiver of the foreign residence requirement, we must consider the Congressional intent of the statute. House of Representatives Report No. 721 dated July 17, 1961, prepared by Subcommittee No. 1 of the Committee on the Judiciary, on the "Immigration Aspects of the International Educational Exchange Program" is pertinent. On page 121 of this report, the Subcommittee reiterates and stresses the fundamental significance of a most

diligent and stringent enforcement of the foreign residence requirement. The Report states: "It is believed to be detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers, including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship."

Counsel states that the record should be reviewed in its totality as required by Slyper v. Attorney General, 576 F. Supp. 559 (D.D.C. 1983). In that matter the judge aptly observed that the "exceptional hardship" standard is stringent so that aliens will not be able to create such hardships themselves in order to evade the purpose of the foreign residence requirement. It is also noted that the alien in Slyper, was specifically assured by the American Vice Counsel that he would not have to depart from the United States for two years, and that determination was noted on the alien's official exchange visitor document. He then married a United States citizen during his temporary stay. The court determined that the absence of the threat of a possible two-year separation was an important consideration with regard to the party's marriage plans, and the problems and hardships were not manufactured by the alien and his spouse; they were created, or at least heavily influenced, by an agent of the government.

The present applicant was not provided misinformation by a government official. The applicant knew that she was obligated to return to the Dominican Republic following the completion of her program, but chose not to do so. The record is devoid of specific documentation which would reflect that the applicant's husband and children would suffer any type of hardship, other than emotional hardship due to separation, if they choose to remain in the United States while the applicant temporarily returns to the Dominican Republic. This is the usual hardship which might be anticipated during a temporary separation between family members caused by military, business, educational, or other obligations. While certainly inconvenient, such hardship does not rise to the level of "exceptional" as contemplated by Congress.

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The appeal is dismissed.